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VOLUME 4 NUMBER 3

## Mediation and the Courts

IT IS A PROBLEM in most parts of the globe—the increasing expense of litigation and overcrowded court dockets. Various measures have been adopted to deal with this situation in the United States and elsewhere. One of the most important is mediation, sometimes referred to as alternate or alternative dispute resolution. There are various forms of mediation, but typically the procedure involves a consensual, out-of-court settlement that is much less costly and time-consuming than cases sent to trial.

The proponents of mediation, however, advocate the procedure not only because it eases court backlogs but also because it serves the interests of justice in and of itself, most saliently some types of civil disputes—everything from family disagreements to ethnic strife. In recent years, mediation—court-supervised mediation in particular—has become more commonplace in the United States and, in many

states, the procedure is becoming increasingly standard practice.

This journal looks at mediation in general as well as the various trends that may account for its growing popularity. In the opening article, Hiram Chodosh, a law professor and director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law, explores the diverse features of mediation and how it can be tailored to meet the needs of nations with widely different cultures and traditions.

Robert A. Goodin, president of the board of directors of the Institute for the Study and Development of Legal Systems, deals with pragmatic questions in his overview article on mediation. He looks at the specifics of the process and shows how it has reduced the burden of expensive litigation in the U.S., a country in which the costs of justice have skyrocketed in recent years.

Mediation is becoming increasingly prevalent in the United States both in the private sector and the public sector, as well as in court systems at various levels of government. Peter R. Steenland, Jr., senior counsel at the Office of Dispute Resolution in the U.S. Department of Justice, examines the role of mediation in the federal court system and the importance of such concepts as confidentiality.

Florida was one of the first states in the nation to develop systematic mediation procedures, including an ethical code for mediators. In an interview with Contributing Editor David Pitts, Dr. Don Peters, director of both the Institute for Dispute Resolution and the Virgil Hawkins Civil Law Clinic at the University of Florida, talks about the challenges of implementing mediation in the courts, particularly at the state level, and the kind of resources necessary to help ensure an effective system.

In the concluding article, Contributing Editor David Pitts looks at a case study involving mediation—African American farmers v. the Department of Agriculture. At the time the mediated settlement was approved by a federal judge in early 1999, this was the most significant civil rights case ever to go to mediation and may set a precedent for avoiding long and costly court battles in the U.S. in future civil rights cases.

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email: [ejdemos@usia.gov](mailto:ejdemos@usia.gov)

# Judicial Mediation and Legal Culture

by Hiram E. Chodosh

In a diverse set of legal systems, from the United States to the United Kingdom, from India to China, from Norway to France, from Jordan to Israel, from Mexico to Brazil, judicial mediation is increasingly seen as a potentially complementary and innovative alternative to traditional judicial systems. Hiram Chodosh, professor of law and director, Frederick K. Cox International Law Center, Case Western Reserve University School of Law, explores the diverse features of mediation and how the world views it as a new method for confronting litigation.

FROM THE CONVENTIONAL perspective of most modern legal cultures, judicial mediation is a contradiction in terms. Judges are supposed to judge (not mediate), to apply law (not interests), to evaluate (not facilitate), to order (not accommodate) and to decide (not settle).

This view of judicial mediation as an oxymoron falsely assumes that the functions of judging and mediation are mutually exclusive. It is also out of touch with the modern realities of national court systems.

To justify this new interest will require careful consideration of some fundamental questions. To which set of problems confronting court systems today does judicial mediation pose a significant, albeit partial, solution? What are the varied forms of judicial mediation? What are the sources of interest in it? What are the primary impediments in modern legal cultures to the acceptance of this reform



*Hiram E. Chodosh*

mechanism? And how should interested legal communities proceed in the study, design and implementation of judicial mediation to overcome these obstacles?

### The Limited Capacity of National Courts

In the last decade the world has witnessed a significant increase in national commitments to democracy and free markets. These twin political and economic objectives have spurred an enormous amount of new substantive law, including constitutional and civil rights reform, free trade agreements and commercial legislation. These trends have given rise to an increasing quantity and complexity of private and public disputes both within and across national borders.

However, the reform of national judicial systems has not kept pace with these substantive commitments. Many systems suffer from insufficient institutional resources and outdated

procedures. Litigants and lawyers complain of excessively adversarial, lengthy, costly, prejudiced, opaque trials and unenforceable judgments. Judges demand more resources in court and case management, more disciplinary authority over the progress of litigation, better compensation and greater protection from improper influence by political branches of government and organized crime.

Democratic and market-based trends appear to generate too many legal disputes for traditional national courts to handle. Court backlog reduces the time that can be allocated to each dispute, causing delay. Delays strengthen the incentives for breaching obligations. Poor compliance in turn generates more legal disputes. Backlog, delay and low compliance create a vicious cycle that is difficult for the courts to address.

Most judicial systems do not provide meaningful alternatives to the formal methods of trial. Arbitration is widely available, but disputing parties frequently require court action to compel the parties to go to arbitration or to enforce an award that is contested. Lacking alternatives, many disputing parties either suffer the harm without recourse to a remedy that would make them whole or they pursue self-help or illegal strategies in retaliation.

### Common and Diverse Features

Judicial mediation is one of several remedies to this condition. It comes in varied forms, but may be defined by several widely observed features.

Generally, judicial mediation is a confidential, consensual form of dispute resolution facilitated by a sitting or retired judge who is trained in conflict resolution. Typically, sessions are attended by the disputing parties and/or their legal representatives. Sessions frequently begin with statements from each party of the asserted claims and defenses. They may proceed with private meetings between the mediator and each party. The judicial mediator or the “neutral,” attempts to narrow the disagreements between the parties and to encourage final agreement on settlement. The neutral also explores aspects of the dispute beyond the legal positions of the parties or the permissible scope of judicial relief. Mediation allows the neutral to examine the parties on aspects of the dispute that most litigation systems must ignore. These include:

- the *relative* strengths and weaknesses of each legal claim and defense;
- the impact of these issues on the present value of the claim;
- settlement proposals that more accurately reflect the probabilities of success on the merits; and
- creative solutions, including new business or contractual arrangements between the parties that maximize their ongoing interests.

Judicial mediation may be voluntary or compulsory. In some legal systems, it requires the parties to prepare in writing a summary of their legal and evidentiary positions in advance of the session. Because of their experience as adjudicators, judicial mediators tend to be more evaluative than facilitative, that is, they are generally more willing to share their evaluation

of the merits or value of a claim. If an evaluation is provided, it may be communicated either simultaneously to both parties or consecutively to each party in private sessions. If settlement is achieved, the mediator may assist the parties in drafting a settlement agreement to record their understanding in writing. Each of these features may be adapted to the particular needs of the judicial system.

### Growing Interest Worldwide

The emerging interest worldwide in judicial mediation derives from many sources. Compared with the undesirable condition of most litigation systems, judicial mediation offers certain advantages. If designed properly, it is less adversarial, less time-consuming, less expensive, less formal, and when successful, more final. The parties participate directly in the process, which is designed to be conciliatory in tone, candid in discussion and creative in designing solutions. Disputing parties may communicate directly with one another, opposing attorneys and the neutral. Because the parties (instead of the judge or arbitrator) are responsible for resolving the dispute, they can better control the outcome, shaping it to maximize their competing interests. They are also more likely to comply with a final resolution in which they had an active role in creating.

For many non-European legal cultures, judicial mediation bears a comforting similarity to traditional forms of dispute resolution that predate colonial influence.

Given the relative ineffectiveness of many national judicial systems, many legal opinion leaders have grown increasingly interested in reviving or extending traditional forms of dis-

pute resolution (Indian *panchayats* of five elder arbitrators, or the *wasta* for the process of *sulha* in the Middle East) and integrating them into the formal litigation system (the distinctive form of evaluative Chinese mediation known as *tiaojie*).

India has launched a major campaign to use *lok adalats* (people's courts) for the resolution of auto accident and family disputes. Panels of three (two judges and a doctor or social worker) render non-binding evaluations and facilitate settlement. Likewise, Egypt has designed an integrated judicial mediation mechanism for use in its first instance courts.

Throughout Europe, judicial mediation is seen as a potentially promising mechanism for the resolution of both simple and complex disputes. Norway's conciliation boards (*Forliksradene*) provide a model of extensive comparative interest and international study. In 1995, France expanded the legislative basis for judicial conciliation and mediation. Preliminary work in Russia and the Ukraine is also under way.

In many of these jurisdictions, judicial mediation is seen as useful not only for small claims, auto accidents, family disputes and petty crimes in court systems clogged by a modern docket, but also as an alternative dispute resolution device for the most complex matters, including those involving environmental and intellectual property law.

The World Intellectual Property Organization opened its Arbitration and Mediation Center nearly five years ago in response to the inability of national court systems to handle the technical and multi-jurisdictional complexity of such disputes. The speed of change in strong

national and emerging global markets put increasing pressure on large business interests to resolve disputes quickly and inexpensively, as well as amicably, constructively and creatively, in order to maximize long-term interests and to maintain ongoing commercial relationships.

Effective judicial and other forms of mediation at the local level also may provide a strong foundation for conflict resolution on the international scene. When direct negotiations fail, communities that seek to resolve profound intra- and inter-border conflicts are increasingly turning to neutral third parties. These neutrals may be prominent political leaders or diplomats, for example, former U.S. Senator George Mitchell in Northern Ireland or the Norwegian diplomat Terje Roed-Larsen in the Middle East; non-governmental institutions such as the Carter Center in the Ethiopia/Eritrea conflict; quasi-judicial commissions such as the Truth and Reconciliation Commission of South Africa; countries such as Kenya in the Mozambique/RENAMO conflict; or international organizations such as the United Nations in the Soviet withdrawal from Afghanistan.

### Impediments to Acceptance

The acceptance of judicial mediation into a national legal culture does not necessarily follow from these perceived advantages, however. Despite its increasingly widespread use, judicial mediation poses an ostensible threat to important values expressed by many modern legal cultures.

Beyond the conventional view of judicial mediation as oxymoronic, judges may see it as a threat to their authority to make public judg-

ments and normative pronouncements. They may perceive the risk of a “brain drain” from the bench as a consequence of perverse incentives for judges to retire early in search of a more lucrative career in private dispute resolution.

Lawyers who produce their income by working in court may see mediation as a threat to their livelihoods. If more disputes are to be mediated, lawyers might view this as consistent with a reduction in demand for their services.

Litigants in systems where there is little trust of judges generally may feel more comfortable with a formal, public, albeit more rigid, procedure. In some cultures, litigants may not be able to maintain dignity or honor if they have to admit their mistakes or make a concession.

Scholars may object to the use of public resources for the diversion of legal disputes from public scrutiny. And the public may resist the notion of discounting the worth of legal rights based on the probability of success or the time value of money.

Furthermore, the mere creation of alternatives to trial, without significantly reducing delay, may not be effective in practice. Absent the pressure of imminent jeopardy, incentives to negotiate directly remain weak. Consequently, mediation may not be effective unless closely linked to other reforms that shorten the time to judgment.

### Developing A Greater Acceptance

Judicial mediation is potentially useful only if it responds appropriately to real problems, genuine needs and their actual causes. When considering the acceptance of mediation, legal communities should first endeavor to conduct a

candid assessment of the practical operation of the judicial process.

The greater awareness of its increasingly widespread application will soften the initial tendency to dismiss judicial mediation as anathema. Legal communities should study the available models of mediation, drawing on both indigenous traditions in informal dispute resolution and comparative and international trends in conflict resolution reform.

The process of tailoring judicial mediation to meet local needs should address the legitimate concerns of the primary participants in the judicial process. There should be a detailed adaptation of the use of mediation to enhance its acceptance and effectiveness in the contemporary legal culture.

Initial efforts to experiment with judicial mediation should target a limited category of disputes. This will reduce the perceived threat that mediation will altogether replace the role of judges in the adjudication of disputes of great public concern.

By employing judicial mediation both in and outside the courts and by limiting the pool to judges who have reached mandatory retirement age, fear of premature judicial retirements may be allayed.

Demonstrating how legal professionals can increase the value of the service they perform for their clients in this new process will alleviate concerns about reducing levels of compensation for legal services. Legal limits on the types of disputes that are required or permitted to go to judicial mediation will reduce concerns about the impropriety of diverting critically important disputes from public scrutiny.

Finally, the integration of mediation with other court and case management reforms will be very important in ensuring that the incentives for settlement are sufficiently strong to make it effective.

### Drawing on Traditions

In each of these efforts, knowledge and appreciation of the culture are critical. Translation and interpretation are very important. For example, in Arabic-speaking cultures, the notion of unilateral concession (*tanazol*) is less likely to be an effective concept than the alternative notion of compromise (*hal wassat*) or concession as part of a series of mutual concessions (*musawama*). Crude equivalence between judicial mediation and cultural forms of dispute resolution (e.g. U.S. mediation and *tiaojie* in China) must also be avoided.

Within the Jewish tradition, for example, the *shadkham* (marriage), *Metavekh* (broker), *borer* (rabbi/arbitrator) and *shtadlan* (interceder/diplomat) all denote varied actors with different roles. Efforts to draw on these traditions must proceed with adequate sophistication about the subtle, yet significant differences between these pre-existing cultural forms and newer innovations.

Through this process of design and adaptation, the legal community should endeavor to achieve a broad consensus prior to the implementation of the reform. Failure to do so is likely to end in disappointment. If the primary actors in the judicial process are unwilling to participate in good faith, this primarily consensual and collaborative process will be of little use.

Once the design is established and consensus developed, legal communities must develop a strategy for implementation. The location, scope and conditions for the first stage of implementation, e.g., a pilot project, must be carefully determined. The budgetary impacts and allocations, facilities, selection and certification process, training and development, proper coordination with court administrators, the authority for reform by administrative action or judicial order short of legislation, and the timetable for implementation, evaluation and midstream amendments all present critical issues. Prior attention to these questions will enhance the likelihood of successful acceptance.

### A Tool for the 21st Century

Mediation is no panacea for the world's conflicts. Resistance to its varied forms, including judicial mediation, will remain strong in some quarters. However, an assessment of contemporary judicial systems will reveal that without complementary alternatives to trial, formal litigation systems are unlikely to realize their primary objective of delivering justice. An open study of worldwide reforms will provide a greater awareness of the available tools to solve contemporary problems. A thoughtful adaptation of practicable models will ensure the preservation of important values and also limit the obstacles to implementation. The development of consensus (from the bottom up) among primary participants in the judicial process will provide an important foundation for the acceptance of reform determinations (from the top

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down). And effective implementation strategies will be critical for transforming well-intended proposals into effective and beneficial legal practices.

Through this process of assessment, comparative study, adaptation, consensus-building and implementation strategy, legal communities will be better able to use judicial mediation as one of many tools designed to meet the conflict resolution challenges of the next century.

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# Mediation: An Overview of Alternative Dispute Resolution

by Robert A. Goodin

Mediation has become perhaps the most popular procedure in the alternative dispute resolution area, an area that is revolutionizing the handling of cases in the U.S. legal system. In this overview of mediation, Robert A. Goodin, president of the board of directors of the Institute for the Study and Development of Legal Systems and a partner in the San Francisco law firm of Goodin, MacBride, Squeri, Ritchie & Day, looks at the process and how it has reduced the burden of costly litigation in U.S. courts.

BY THE LATE 1980s and particularly beginning and continuing through the 1990s, mediation has become an increasingly popular procedure in all types of civil cases. In fact, it is now probably the most popular form of alternative dispute resolution used by litigants in civil cases in the United States. Moreover, because of its flexibility, it is increasingly used not only in civil disputes but also criminal cases and in cases that are on appeal.

Mediation is a structured negotiation presided over by a facilitator with the skill, training and experience necessary to help the parties reach a resolution of their dispute. It is a process that is confidential, non-binding and geared to assisting the parties in structuring a mutually acceptable resolution to whatever dispute has prompted the mediation.

Because the process leaves control of the settlement in the hands of the disputants, and because it is oriented to producing solutions



*Robert A. Goodin*

that accommodate the fundamental needs of each side, mediation is a dispute resolution technique particularly appropriate for circumstances where the parties to the dispute have had or expect to have, a continuing relationship. It is also, however, well suited to disputes that do not involve such relationships.

### Emergence of Mediation in the U.S.

In many cultures mediation, or “conciliation” as it is sometimes known, has been a staple of alternative dispute resolution for generations, typically presided over by a town elder or respected figure in the community.

The emergence of mediation as a device to resolve litigation in the United States can probably be traced to the seminal work in negotiation theory done by Roger Fisher and William Ury of the Harvard Negotiation Project, popularized in their 1981 book *Getting to Yes*.

The central insight of Fisher’s and Ury’s work was that most negotiations are conducted by bargaining over positions and can result in either impasse or an agreement that is perceived by one of the parties to have been imposed simply through superior strength of the other.

Fisher and Ury suggested that instead of being based on positions, bargaining should focus on the underlying interests that motivate parties to take these positions. In this manner, creative solutions can be developed that meet, at least in part, the underlying interests of each of the parties, thus permitting a principled and mutually advantageous resolution of the conflict.

A simple illustration, used by Fisher and Ury relies on the concept of interest-based bargaining. Two men are seated at a library desk and cannot agree about whether the window above the desk should be open or shut. After much wrangling and no solution, they summon the librarian who asks each party the reason behind his position. The man who wishes the window open explains that he wants fresh air. The man who wishes it closed explains that he wants to avoid a draft. Armed with this information, the librarian arrives at a solution—opening the window in an adjacent room—that accommodates the interests of each of the parties and which would not have been possible if the parties had simply continued to bargain over their positions.

Because mediators are trained to explore the interests underlying each party’s position in a mediation, and because the process itself is conducive to that exploration, mediation is an

ideal forum in which to use the negotiation philosophy advocated by Fisher and Ury.

### Mediation in the Courts

Many courts in the United States, both state and federal, have mediation programs. This has been particularly true since the 1990 Civil Justice Reform Act (P.L. 101-650) required federal courts to design and implement alternative dispute resolution programs.

Mediation typically arises in one of two contexts in U.S. litigation. The first is through court-ordered or court-annexed mediation. Typically, such courts maintain a panel of approved mediators who offer their services to litigants, at either the court's direction or the litigants' request.

The second context in which mediation arises is private mediation. In these cases the parties to a dispute decide that mediation would be appropriate and select a mediator from among the many private providers who have gone into the business of offering these services.

Mediation as a technique for resolving disputes first began in the area of family law, probably because the nature of the emotions involved often led to serious problems with positional bargaining and because the parties, like it or not, were often forced to have a continuing relationship because of children.

Mediation in family law disputes was quickly recognized as a valuable tool, and courts and litigants soon realized that using mediation was not limited to family disputes but could be extended to other civil disputes as well.

The reasons for mediation's growing popularity in all areas of civil litigation are abundantly clear:

- Mediation is non-threatening. It is non-binding and thus permits client control of the outcome.
- Mediation is relatively inexpensive. Most sessions last no more than one or two days.
- Mediation works. Most mediators report 80– to 90–percent success rates.

### The Mechanics of Mediation

One of the advantages of mediation is its flexibility. A mediation session can be designed in any way that the parties believe would be most useful to the resolution of their dispute.

Before the mediation actually begins, each side will submit a brief or statement to the mediator, which consists of a short summary of the party's position and includes any critical written material, e.g., contracts, etc.

The mediation begins with a joint session attended by the mediator and all of the parties and their lawyers. The mediator hears a presentation by each party outlining its particular view of the case and why it believes it is entitled to prevail in the dispute. Although the lawyers usually take the lead in this presentation, it is important to also allow—and mediators encourage—the clients directly to express their views.

Frequently, after a party's presentation is concluded the mediator restates the position to ensure he has not missed anything. After the mediator has heard presentations from each side, the joint session is ended.

The purposes for the joint session are several. First, it allows the mediator to hear first-hand each party's statement of its position. Second, by accurately reciting back the positions to each of the parties, the mediator can build credibility with both sides by demonstrating that he has truly understood any contentions. Finally and importantly, the joint session allows each side to hear the other side's arguments directly, without the "filtering" that typically occurs when cases are reported only through the lawyers.

Following the joint session, the mediation breaks into individual meetings where the mediator meets with each side privately in an attempt to bridge the gaps that exist. It is in these private sessions where the mediator spends substantial time candidly identifying with the parties what their true interests are and developing options that might satisfy those interests. At the same time, the mediator is looking for common ground between the parties.

As a motivation for developing creative alternative solutions, the mediator will often explore some of the legal strengths and weaknesses of the party's case. Typically, multiple private meetings with each side are held that increasingly narrow the differences between the parties. At the conclusion most cases are resolved.

### Training and Compensation

At the present time there are no licensing or certification requirements for mediators in the United States and no formal training is required to offer those services. Nevertheless, most people who offer mediation services have received some training.

Most courts that have court-annexed mediation programs require training of the people who wish to be members of the mediation panel and also offer the training to others who wish to receive it. In addition, many private, continuing legal education providers offer mediation programs. Court training usually consists of a multi-day program comprised of lectures and demonstrations. Role-playing sessions during training allow students to play the mediator in a mock case using the skills they have learned.

Compensation varies depending on the context in which the mediation arises. Most court-annexed mediation programs ask that the mediators on the panel volunteer their services for a portion of the time devoted to the mediation (for example, the first four hours) and require the parties to compensate the mediator thereafter at a court-established hourly rate.

In the case of private mediation, the compensation is a function of the agreement between the parties and the mediator. Typically, private mediators offer their services at an agreed daily rate, which can be rather substantial. Private mediators are able to ask for and receive more compensation because the litigants realize the potential value of their services. For example, most privately mediated disputes have much smaller amounts in controversy than potential future legal fees that would result if a case went to litigation.

### Reducing the Burden on the System

Because mediation is so effective, it offers tremendous cost savings and other benefits to the parties involved. By resolving cases and getting them out of the court system, mediation also

reduces the burden on that system and promotes speed and efficiency in the processing of cases.

Since most court systems worldwide have cost and delay problems similar to those in the United States, and because mediation is culturally familiar in so many countries, the alternative dispute resolution movement appears destined to attain tremendous international currency as the new millennium progresses.

# Court-Annexed Mediation

by Dr. Don Peters

Dr. Don Peters, director of both the Institute for Dispute Resolution and the Virgil Hawkins Civil Law Clinic at the University of Florida, has extensive experience in alternate dispute resolution (ADR) and court-annexed mediation in Florida, which was one of the first states in the nation to develop ADR procedures, including an ethical code for mediators. In this interview with Contributing Editor David Pitts, Dr. Peters talks about the challenges of implementing mediation in the courts.

**Mr. Pitts.** What do you consider the greatest challenges in implementing alternate dispute resolution in the courts?

**Dr. Peters.** I think envisioning accurately what you want to accomplish and then creating the implementing steps are the most significant challenges for court-annexed mediation. You need to ask the following questions:

- Will court referrals lead to mandatory or voluntary mediation?
- Will courts refer a broad case range or only specific targeted cases to mediation, and what cases will be exempt from referral?
- Will the effort be a comprehensive state-wide approach, such as was pioneered by Florida, or will it be a local court-by-court experiment such as occurs in the federal district courts and in some states?



*Don Peters*

- Will the court provide mediation services or rely on private mediators, or create some combination?
- How will the mediators be selected for individual cases?

Some of the important implementing steps include: 1) creating statutory or rule-based authority for the referrals, 2) creating any necessary procedures regarding the mediations, 3) creating a means to ensure minimal mediator competence, which often includes mandatory training or certification requirements, ethics codes and mechanisms for their enforcement, 4) securing adequate funding and 5) determining who will coordinate the program.

All of these decisions and implementing steps can present significant challenges depending upon the circumstances confronting individual courts.

There is a concern that emphasizing such things as ‘clearing the docket’ and ‘speeding up trial time’ may actually affect how mediation is

conducted. For instance, they may overemphasize settlement rates, which may encourage mediators to be coercive, which in turn conflicts with the goals of the mediation process.

There is also some evidence suggesting that mandatory mediation may not be reducing court personnel expenses because the same number of cases are still going to trial. Only about four percent of civil cases make it to trial in most court systems. Instead, mandatory mediation may be influencing the types of cases that make it to trial, for example, the ones that cannot be negotiated easily. But it also may be helping ensure that trial time is given to the cases that need it most.

**Mr. Pitts.** Mediation can either be mandatory or through agreement by the parties involved. How are the majority of cases handled, and does the court exercise any review once mediation begins?

**Dr. Peters.** Mandatory mediation proceeds as outlined in the rules and statutes of a state, whereas voluntary mediation can be adapted by agreement to create whatever process the parties wish.

I think most successful mediation programs in the United States are through mandatory mediation. Certainly most state courts, including Florida, which is the system I’m most familiar with, have mandated mediation.

As for court approval, an agreement reached during mediation is deemed to be a contract. The parties are negotiating their way out of a dispute by reaching an agreement that has the force of a contract, and so the court generally does not review agreement terms.

An exception to that rule might exist when a court would see something in a mediated

agreement in a family-law case and conclude that it is not in a minor child's best interest. That is about the only situation I can think of where the court would exercise any kind of review over the outcome of a mediation.

**Mr. Pitts.** What are the resources required to set up an ADR program?

**Dr. Peters.** The resources needed depend upon the choices that are made regarding the decisions and implementation of the steps that I mentioned earlier. The biggest expenses typically are the court-provided mediation services. Using private mediation-providers who are paid by the litigants is the least expensive route. There is some use of volunteer *pro bono* mediators in the various court-annexed programs around the country. Some expenses in Florida, for example, are paid by general court budgets through mediation certification and re-certification fees and by additions to court filing fees, which are sums of money paid to the court for particular charges that are mandated by state law.

Filing fee additions also have been a popular source of funding in other states' programs because they provide a steady reliable revenue source. They legitimize the ADR process by requiring everyone who uses the court to fund the program even if not all cases are sent to mediation. The justifying theory is that litigants who do not actually use ADR may in fact benefit by gaining more timely access to a traditional legal tribunal. Another advantage is that this approach communicates the fact that litigation is not the only service that courts can offer.

On the federal front, a 1996 survey of federal court programs shows wide diversity from

district to district. Nevertheless, it concludes that most federal courts now use private mediation services and require litigants to pay the fee.

**Mr. Pitts.** Who are the key players in the ADR process?

**Dr. Peters.** The key players in court-annexed mediation are the judges, the lawyers, the litigants or participants and the mediators.

The judicial role is limited to referring the case to mediation and occasionally designating the mediator. The Florida premise is that the judge, together with the parties, is in the best position to determine if a case is appropriate for referral. Once that decision is made, some systems authorize judicial appointment of a certified mediator from a rotating list or a program maintained by the court. These mediators are primarily used in lower-income family cases and in volunteer small-claims cases.

Once mediation is ordered, the lawyer's role in mediation often includes selecting the mediator if private mediators are used. Florida has a "10-day rule" allowing parties to agree on a mediator within 10 days of an order referring the case to mediation. This provision is used in more than 90 percent of the private-mediator referrals in circuit and family court cases.

The lawyer also has an important role in preparing litigants for mediation, which includes explaining the mediation process fully. He outlines the general roles of the mediator; that she or he is a facilitator but not a decision-maker. He explains the confidentiality parameters, which are set forth typically by statute law in states that have adopted mandatory mediation.

He explains the mediation process, which includes opening statements by participants—often including clients as well as lawyers—and then alternating joint and private sessions thereafter.

An attorney also plays a major role in representing participants in mediations. A lawyer is usually given the right to attend and participate fully in a mediation. In Florida, for example, an attorney must appear in circuit court mediations unless otherwise stipulated or ordered, and he may participate in county court mediations. He also may, but is not required to attend, family court mediations.

Typically, in Florida, lawyers act as the primary negotiators during mediations. They stay throughout circuit court cases and then lead the dialogue during the economic aspects of family cases, but play less significant roles once custody and visitation rights are under discussion.

In most states—including Florida—participants are usually required to attend court-ordered mediation. Otherwise, they can be sanctioned for failing to attend without good cause and made to pay mediator and attorney fees or other costs.

Court-ordered mediation has proven to be a very good way to involve and commit lawyers and participants to the mediation process because, in essence, they have no other choice. The theory is that if you sit people down with authority they will make good use of the time and at least talk.

Most lawyers and litigants appreciate the things mediation adds to the pre-trial negotiating process. For instance, lawyers learn that mandatory mediation is totally consistent with

their traditional practice of pre-trial settlement in most civil cases. Control of negotiating and strategizing is not taken from them, and it does not prevent them from trying cases they and their clients want to try.

Mediation generates a closure that encourages parties to reassess the risks and consequences of not agreeing. Litigants can give vent to emotional issues better and more broadly than possible at trial because those issues will typically not be as relevant in court. They also can avoid the stress of participating in a trial and the time lost from work, as well as the additional costs incurred.

Mediation lets lawyers make concessions within private meeting-like settings, which is an easier place to concede from earlier positions because it helps “save face.” It also provides a process that permits the confidential sharing of information that could generate solutions but that is too risky to share with the other side directly. Mediators can use this information to explore potential solutions without disclosing it directly. They also can point out case weaknesses that re-enforce what lawyers may have already told their clients initially. This can help litigants decide to revise their thinking and move toward agreement.

Mediation can take advantage of a neutral area on the difficult questions involved in evaluating claims. For instance, it lets the negotiators take advantage of a broad range of solutions. Apologies, for example, are typically not things that courts can order, except in defamation lawsuits. But apologies can be very important to creating the good will that results in a settlement. In mediation, you can be very creative.

**Mr. Pitts.** What kinds of training programs are required for mediators?

**Dr. Peters.** The mediation community is recognizing the importance of developing mediator qualifications to protect consumers and to protect the integrity of the process. Most states deal with this by statute or by rule, often following Florida's lead in using a certification process.

Typically, qualification or certification requires some combination of the following: mediation training, apprenticeships or mentorships, educational requirements and previous experience in related fields. There are lots of individual variations from state to state, and the federal courts often rely on state qualification or certification procedures.

Florida, for example, mandates different qualifications for certification in different areas of mediation. The cornerstone is a non-waivable training requirement that consists of 20 hours in county courts and 40 hours in family and circuit courts. The training programs must be taught by persons qualified by the state supreme court. They must meet specific educational goals, and they must be approved by the Florida Dispute Resolution Center. Programs typically cover general dispute-resolution theory. They explain and develop through practice, specific mediation skills and role playing where the participants are observed and critiqued.

Mentoring requirements follow the training. For Florida county courts, you have to observe and conduct four mediations under the supervision and observation of a certified county mediator. In family and circuit court, you have to observe and co-mediate two. No educational experience or qualifications are required

for county court mediation. For family court, you must have at least four years' experience as an attorney or as a certified public accountant; or have a master's degree or PhD in social work, mental health, behavioral or social sciences; or be a physician certified to practice adult or child psychiatry. For circuit court, you must be an attorney with at least five years' experience on the Florida Bar or be a retired judge. Both attorneys and judges must be members of the bar in the state where they reside.

The certification process in Florida—which lasts two years—consists of demonstrating compliance with these criteria, training requirements and the payment of a certification fee.

**Mr. Pitts.** Why are the vast majority of mediation cases civil rather than criminal?

**Dr. Peters.** The stakes and the interests are different. Civil cases primarily involve private interests. States get involved only by providing ADR solutions so that the parties can use law to adjudicate claims regarding their private interests. The burden of proof is a "preponderance of evidence." Remedies are typically monetary or equitable. Personal liberty is seldom involved, the death penalty is not available and there is no presumption of innocence favoring the accused as in a criminal proceeding. Whatever private parties decide to do is okay as long as it does not violate a law or other expression of public policy.

Criminal law cases, on the other hand, involve crimes against the state, and enforcing these laws protects society's collective interest and behavioral norms. Defendants have a presumption of innocence until proven guilty and

the burden of proof is “beyond a reasonable doubt.” Defendants also have a right to remain silent and cannot be forced to testify. So it is rather hard to see how mediation, which is a process based upon conversation, would be effective.

The attempt to move mediation to the criminal justice system has been primarily in the arenas of victim/offender mediation and neighborhood justice. Cases typically referred are usually small crimes and other things that may be burdensome to prosecute: bad check charges, for example.

These programs typically depend upon the willingness of victims and offenders to participate in a constructive manner. But severe problems exist with offenders who feel coerced into participating and are led to believe that their subsequent prosecution or sentencing will be harsh if they do not reach an agreement in mediation. It really transforms the criminal justice paradigm by putting victims at the center rather than on the periphery of the criminal process and it transfers the power to resolve all or part of a criminal case to a private party.

**Mr. Pitts.** Finally, in your personal view, how well do you think mediation works?

**Dr. Peters.** I think it works very well. It is certainly a fact of life in Florida law practice now: if you’re going to litigate you’re going to mediate. A large number of Florida attorneys have taken mediation training primarily to learn more about how to advocate effectively.

My work in small claims court suggests about a 60-percent compliance rate with mediated agreements in collection cases. That shows some measure of how well mediation works.

One small claims study showed that unusually large awards going entirely to the plaintiff occurred in nearly 50 percent of trials but only 17 percent in mediated outcomes.

In other areas, there is one divorce study that found a significant percentage of divorcing couples who did not reach an agreement, nevertheless, valued the mediation process because it accomplished other things, such as improved communication, and in a few cases, reconciliation. A divorce study also has shown that mediation produced more joint-custody agreements, while adjudication produced more sole custody agreements.

So there is some evidence suggesting mediated agreements involve more compromise and more equal sharing of resources than adjudicated outcomes.

Mediation has emerged as the primary ADR process in federal courts. Many federal courts now require attorneys to discuss ADR with their clients and opponents. For example, mediation has basically changed the way litigation occurs in the Florida courts. Anecdotal evidence suggests that more clients are asking for it, and more attorneys are requesting it before the court gets involved.

Mediation really does seem to add a new, different process that can be used in tandem with the litigation process before adjudication.

# The Role of Dispute Resolution in U.S. Federal Courts

by Peter R. Steenland, Jr.

The use of dispute resolution to accomplish a swift and efficient settlement of civil lawsuits is fast becoming a trend in the United States. In this article, Peter R. Steenland, Jr., senior counsel at the Office of Dispute Resolution in the U.S. Department of Justice, provides an insight into alternative dispute resolution and gives an overview of how the Department of Justice uses the process in its cases.

IN THE UNITED STATES, the Department of Justice is responsible for conducting litigation on behalf of federal agencies and their officials, using a staff of lawyers in Washington and in 94 judicial districts throughout the United States. These lawyers are responsible for some 20 percent of all the civil cases in the U.S. federal courts. Cases include some of the most complex and difficult litigation in the country, covering a wide variety of subjects including tort claims, civil rights enforcement, employment law, contract disputes, environmental claims, tax matters and issues involving antitrust laws.

To achieve greater efficiency in handling these cases, U.S. Attorney General Janet Reno in 1995 established a Dispute Resolution Program in the Department of Justice that is applicable to all civil cases. The attorney general ordered every lawyer at the Department of Justice to be trained in how to use mediation and in advanced negotiation techniques. She



*Peter R. Steenland, Jr.*

also set aside funds to hire mediators for government cases and made clear to those who litigate with the federal government that the United States was interested in using mediation when appropriate.

Under the auspices of the Dispute Resolution Program, the Office of Dispute Resolution was established to work with Justice Department lawyers, the courts, professional organizations and other federal agencies to promote greater use of mediation and other forms of dispute resolution. From the attorney general's perspective, every government lawyer should be a "problem solver" as well as a litigator and should be prepared to use whatever processes might be helpful to secure a favorable resolution of the dispute with a minimum amount of conflict.

In the four years since the office's inception, the use of dispute resolution by the

Department of Justice has increased four-fold. A form of dispute resolution—usually mediation—is used in some 2,000 cases per year to help find solutions to problems that are acceptable to all parties. Often, this involves a settlement on terms that courts do not have the authority to provide but is nevertheless very important to the parties. This point demonstrates that litigation can be an inefficient way of resolving disputes because a court can only decide legal questions. It cannot address the underlying interests of the parties that may have caused the dispute in the first place.

### "Justice Delayed Is Justice Denied"

Under the U.S. judicial system, both federal and state courts give priority to criminal matters. Often, the accused is incarcerated before trial, and on many occasions, the testimony of witnesses to the crime may not be as effective if a great amount of time has elapsed between the crime and the subsequent trial. Thus, while there may be good reasons for giving priority to pending criminal matters, such preference can have an impact on civil disputes that also are awaiting a court date. Generally, the larger the criminal docket, the longer it takes for an ordinary civil case to be decided by the court.

The delay of any court proceeding is, of course, a serious concern for civil litigation as well as for criminal cases. The old maxim of "justice delayed is justice denied" can be all too accurate, especially in a civil lawsuit seeking monetary damages for someone who has been injured or who is out of work, or for a party seeking to enforce provisions of a contract. Another concern for parties in civil litigation is

the increased amount of legal fees they may be charged, often resulting from an extensive discovery process and other trial preparation activities. Indeed, some parties find that after spending a great deal of effort getting their case to court and ultimately prevailing, they really have not “won” because the time and money they spent to achieve victory far outweigh whatever benefits they may have received from a favorable judgment.

For these and other reasons, a growing number of parties in civil lawsuits are turning to dispute resolution, and especially to mediation, to assist them in obtaining an early and acceptable solution for civil litigation. Although there are many processes associated with dispute resolution, such as arbitration, early neutral evaluation, mini-trials and summary jury trials, the clearly preferred process is mediation.

### Not Deciding Right or Wrong

In mediation, an individual who has been trained to assist the parties to negotiate with each other conducts confidential meetings with each side in the litigation. The mediator is not asked to decide who is right or who is wrong, and it is not expected that the mediator will try to force any specific outcome on the parties. Instead, through confidential meetings with each side, the mediator attempts to develop options for settlement the parties may be reluctant to explore on their own and to identify key interests of the parties that will need to be accounted for in any settlement.

When a case is selected for the dispute resolution process, mediators are chosen jointly

by both parties in the lawsuit. Experience in mediation is more important in selecting a mediator than is the mediator’s experience in the subject of the dispute. Since the mediator has no power to decide the case, parties in litigation against the federal government must be willing to cooperate in a search for a mediator acceptable and fair to all. Generally, the parties involved in the mediation share the cost and fees of the mediator equally.

If the mediator is able to assist the parties in reaching a consensual resolution of the case, the settlement is reduced to a written agreement in the form of a contract. In some cases, the parties may present the settlement to the judge so that it can be entered as an order of the court. If there is no settlement, the parties are free to return to court and conduct litigation as if the mediation had never occurred.

### Confidentiality

A key ingredient in any successful mediation is that the actual negotiations are confidential. By making all negotiations confidential, the parties are more willing to explore settlement options than if they were negotiating on their own. Confidentiality also applies in all private meetings that the mediator conducts with each party, so that nothing said in any meeting between a party and the mediator is revealed to the other side unless it is agreed to by the participants.

If the parties are able to reach a settlement, the agreement becomes a public document because the public has a right to know how the government has resolved a legal dispute. On the other hand, if the mediator is unable to bring the parties to an agreement,

there is no reason to acknowledge anything other than the fact that an attempt had been made at settlement.

### The Benefit of A Court Ruling

In some cases, the U.S. Department of Justice will not use dispute resolution because it believes the public is best served by having the matter decided by a court. This is true when the government believes the other side in a lawsuit has no legal arguments of any merit, and where success in court is virtually assured. Sometimes there are circumstances when the government needs the benefit of a court ruling in order to obtain a judicial declaration about the meaning of a new law or regulation. This sets a precedent so that parties affected by that legal issue, as well as those who are not participating in the lawsuit, will know what that law or regulation requires of them.

### A Consensual Process

It is important to emphasize that this is a consensual process and that in the United States, no judge or mediator can force any party to settle a lawsuit against that party's wishes. About 60 percent of the mediations involving the federal government result in settlement. If the party opposing the government in a lawsuit does not want to settle, and has no interest in using dispute resolution, this process cannot be forced upon it. Similarly, another party cannot force the government to settle a case where the government is determined to seek a final ruling from a court.

Mediation and other forms of dispute resolution allow the parties in a civil dispute to negotiate in an informed and efficient manner. They are able to reach resolutions more quickly and to find ways of settling cases that might not have been considered if they had been negotiating in an unassisted fashion.

From the particular perspective of U.S. government litigation, dispute resolution is an especially important tool that allows federal attorneys to maintain their customary vigilance without incurring the consequences of the adversary process that often result from protracted and hard-fought litigation. By engaging in problem solving with the other side in a lawsuit, they are able to effectively represent the United States with a maximum amount of respect and a minimal amount of conflict.

As such, mediation is a valuable tool that every lawyer should be able to use, when appropriate, to assist a client in reaching a satisfactory resolution to a legal dispute.

# Black Farmers v. the Department of Agriculture

by David Pitts

In April 1999, a federal judge approved a settlement in the most significant civil rights case ever to go to mediation. It involved a group of black farmers who alleged that the U.S. Department of Agriculture (USDA) had discriminated against them for more than a decade. Contributing Editor David Pitts traces the origins of this landmark mediation that may set a precedent for avoiding long and costly court proceedings in civil rights and other civil cases in the future.

JOHN NEWKIRT'S ROOTS in the land of rural Georgia run deep. He inherited his 347-acre farm in Garfield—about 40 miles north of Savannah—from his father and later added 147 acres of his own. He says his troubles began in 1984 when local USDA officials denied him a loan to run his farm for reasons he feels were discriminatory. In 1990, he lost his own land completely after the government foreclosed on him. He says he has been able to buy it back, but now rents it out rather than farming it himself. “My land was taken from me,” he says. “I will always have the memory of the pain and suffering that caused.”

James Beverly of Burkeville, Virginia has an even sadder story to tell. He lost his livelihood 15 years ago and is now working as a counselor in a federal prison in Petersburg not far from the farm he used to own. “I was wiped out because I couldn’t get help,” he says. “I got a loan to buy breeding hogs, but was denied a loan for farrowing houses for them after I had



*John Newkirt on his farm in  
Garfield, Georgia.*

already bought the animals. To settle my debt with the government for the livestock loan, I had to sell off my property and go out of the farming business altogether.”

The experience of John Newkirt and James Beverly is far from unique. There has been a marked decrease in the number of farms owned and operated by African Americans generally over the decades. In 1920, there were 925,000 black-owned farms in the United States. By 1992, according to USDA statistics, the number had plummeted to fewer than 18,000—from 14 percent of the total down to one percent, most of them located in the South. Why this happened is a subject of much debate, but most observers agree that discrimination by USDA was a key factor, especially over the last two decades. One of the salutary effects of the ulti-

mate resolution was a renewed commitment to eradicate any vestiges of racism in USDA’s programs.

USDA’s own investigation confirms the problem. An internal audit found that in several Southern states, including Georgia, local offices took an average of three times as long to process loan applications from black farmers compared with white farmers. The Associated Press reports that between 1980 and 1992, for every dollar loaned to white farmers, black farmers received just 51 cents. And in 1982 the U.S. Civil Rights Commission, a government entity, reported that “unless government policies of neglect and discrimination are changed, there may be no black farmers by the year 2000.”

By the late 1990s, African American farmers decided to act. In December 1997, they

filed what became the largest civil rights class action lawsuit in U.S. history. The suit alleged systematic discrimination by USDA in delaying loans, denying loans outright, and withholding technical assistance crucial to the farmers' livelihoods. The suit also alleged that many black farmers were impoverished by USDA neglect and discrimination, while others lost their farms and sometimes their land completely.

### The Case Goes to Mediation

But the case did not go to trial. The parties agreed to mediation at the urging of U.S. District Judge Paul Friedman. "It is not unusual for many civil rights cases, indeed many civil disputes, to go to mediation," says Michael Lewis, a pioneer in alternative dispute resolution (ADR), who was selected by the parties to mediate the dispute. "The question is," he asks, "what is the best way to resolve these cases? Mediation takes less time than going to court, especially if there are appeals, which would have been likely in this case. It also is less costly, and you avoid the possibility of losing completely."

"The farmers agreed to mediate because there had been a history of discrimination dating back 20 years," says Alexander Pires, chief counsel for the plaintiffs. "It had been a long process and they wanted it resolved." Michael Sitcov, the lead attorney for the government, declined to comment. But Andrew Solomon, a spokesperson for USDA says, "I think it is obvious why we agreed to mediate. There was clearly a problem with discrimination. We wanted to deal with it and move forward." Lewis

agrees. USDA wanted "a bad chapter" in its relationship with black farmers to be over with, he says.

President Bill Clinton also weighed in on the issue. In a meeting with black farmers at the White House, which was attended by USDA Secretary Dan Glickman, Clinton made it clear that he wanted the claim on an agency in his own executive branch of government to be brought to a speedy and satisfactory conclusion. "I will do everything I can within my legal authority to accelerate the settlement of these outstanding cases," he remarked. "I will do everything I can do to bring moral and political pressure to bear when possible."

Two days after the White House meeting, on December 19, 1997, USDA, and the Justice Department legal team acting in the agency's behalf, agreed to mediate the case. Neither Pires nor Lewis says the president's statement was critical, but it helped. "It was important to the farmers because it said the president is taking their concerns seriously," says Lewis. "But it wasn't a silver bullet and it didn't affect the course of the mediation."

### A Year-Long Process

It was agreed that the mediation would last six months. But, in fact, "it took almost a year to the day," says Lewis. "My job was to get them to agreement. The complication was that the lawyers for the farmers were not representing one or two people, but many thousands. It's hard to get a sense of what 10 or 12,000 people want. I think it was very important that the farmers be dealt with not as individuals, but as



*Michael Lewis at his office in Washington, D.C.*

a group. We had to figure out a way to resolve all their claims together. This was one of the early struggles.”

“I convened a lot of joint meetings with the two sides and held many separate meetings,” Lewis continues. “It was mostly the lawyers for each side that were present. But representatives of the farmers attended some of the meetings; their lawyers had done a very good job of traveling around the country and talking to them about what their needs were,” he adds. “The process was difficult at first,” recalls Pires. “In the early stages, eight attempts failed. The differences with the government were too wide.”

But in the fall of 1998, an event occurred which was crucial in aiding the plaintiffs’ case. Congress passed, and President Clinton signed into law, a bill that extended the statute of limitations back 17 years to 1981. “No one in Congress opposed extending the statute of limitations,” says Pires. “Who’s against farmers?” This was considered critical because, without

the extension, more than 90 percent of the plaintiffs would not have been able to receive compensation since the alleged discrimination had occurred too far in the past.

Lewis agrees the extension of the statute of limitations facilitated a settlement but also stresses the role of the court during the proceedings as well. “The court was very active and held periodic meetings to keep its finger on how things were going. For example, the court decided a very important legal issue—allowing the farmers’ cases to be banded together. Once the court decided that issue, progress was much more swift,” he says.

### The End of a Painful Chapter

On April 14, 1999, Judge Paul Friedman approved a multi-million dollar settlement of the case. The USDA engaged in “pervasive discrimination against African American farmers,” he said in a 65-page opinion released after the settlement. The denial of credit and technical assistance had a “devastating effect” on black farmers throughout the nation. The judge made it clear that much remains to be done to undo the historical discrimination. “But the Consent Decree represents a significant first step,” he noted.

In his opinion, Judge Friedman cited James Beverly’s case in Virginia as an example of the injustice that had been done. He did not mince words. “The USDA broke its promise to Mr. James Beverly,” he said. “It promised him a loan to build farrowing houses so that he could breed hogs. Because he was African American, he never received that loan. He lost his farm because of the loan that never was.

Nothing can completely undo the discrimination of the past or restore lost land or lost opportunities to Mr. Beverly, or to all of the other African American farmers whose representatives came before this Court.”

Speaking for the government, USDA Secretary Dan Glickman heralded the settlement conceding that discrimination had indeed been a problem in his agency. “With this approval, USDA can move forward to putting a painful chapter of our history behind us,” he said. Glickman told CBS: “There was no question that in a lot of places in the country, minority farmers did not get the loans that non-minority farmers would get.” The USDA chief also vowed to eradicate racism in the Department of Agriculture. He had already taken action to reestablish the agency’s Office of Civil Rights that had been disbanded in 1983 by the Reagan administration.

The reaction of the lawyers for the plaintiffs was ecstatic. “This is the largest recovery in a civil rights case in the history of the country. There are very few billion-dollar settlements,” Pires said at the time. Asked why the government agreed to such a large settlement, he responds, “I think they decided they couldn’t win this one in court. Also, I think many government officials knew there had been discrimination, recognized it, wanted to settle and move on.”

Representative John Conyers (Democrat-Michigan), the dean of the Congressional Black Caucus, also hailed the agreement calling it a milestone. “I heartily congratulate the black farmers who have labored so arduously and so long for vindication and economic relief,” he remarked.

Under the agreement, claimants need only show minimal documentation to be eligible for a \$50,000 tax-free, cash payment plus the forgiveness of debts to USDA—worth on average between \$75,000 and \$100,000. Farmers can claim more by going to arbitration—which Michael Lewis also will oversee—but must provide more documentation to do so. Asked how the size of the settlement was determined, Lewis says, “the best answer I can give is through negotiation. I think the plaintiffs’ lawyers looked at the average debt of the farmers and other relevant factors—but eventually just through negotiation.”

It is understandable that an attorney such as Lewis, one of the founders of ADR Associates, a leading company engaged in providing mediation services, should extol its benefits. But he stresses that mediation is not suitable for all circumstances, even in civil cases. “There are important issues—important cases—where you really do need a court to say, ‘this is the law of the land.’ This was true in the school segregation cases of half a century ago, for example. It was an issue that clearly needed to go to the Supreme Court for final resolution, as it did,” he says. “But cases like that are few and far between.

“The way the consent decree is written, a monitor responsible to Judge Friedman will be appointed to oversee the implementation of the settlement. That individual has not yet been selected,” Lewis says. The cutoff date for the farmers to file applications was October 12, 1999, 180 days since the issuance of the consent decree. According to Pires and sources within USDA, more than 15,000 farmers filed ahead of the deadline—many more than originally anticipated—and most have chosen to file

under the general settlement provisions, not arbitration. The first settlement checks were expected to be mailed in November.

Most of the farmers are reportedly satisfied with the mediated settlement, but not all. John Boyd and Gary Grant, who lead two of the most influential organizations representing black farmers and who are credited by many with helping to organize their effort, say it did not provide enough money to claimants who chose not to pursue arbitration and did not require enough changes in the loan process at USDA. But Lewis says it is important to understand that no side wins everything in a mediation, that in exchange for avoiding costly and long court proceedings, each side must give a little.

#### “We Struggled So Long”

James Beverly, who also is the Virginia representative of a national organization for African American farmers, says he is proud Judge Friedman mentioned him in his opinion about the case as an example of what happened to thousands of black farmers. He says he is generally satisfied with the agreement. “We didn’t get everything we wanted. But I approve of it.” He also says the majority of the farmers in his area have filed under the general settlement provisions and already have received letters of approval.

As far as his own situation is concerned, James Beverly says he has chosen to pursue arbitration since he feels the financial loss he incurred through losing his farm was far greater than the general settlement terms provided for. Asked if he feels he will win, he responds, “I feel pretty confident about it.” But he wants it known that the most important issue for him is

not the money. “It is that we struggled so long for our voice to be heard. At long last, we are being heard.”

John Newkirt in Georgia calls the settlement “a very good gesture even though no one is completely satisfied.” He says he chose to file under the general settlement provisions and already has received a letter back from the government, although not yet a check. The Georgia farmer also says that he lost more than he will get in compensation. “But to me the importance of the settlement is not the checks they are mailing to us, but the respect they are now showing us.” He adds: “I appreciate the government saying to black farmers. ‘You were economically disenfranchised. We recognize that and want to make amends.’”

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Now nearing 70, John Newkirt is proud of his family’s contribution to American agriculture and is eager to take a visitor in his two-toned, pickup truck to see the cotton and other crops that grow plentifully on his land. He describes the struggle for a fair shake for black farmers as long and difficult, but it is testimony to the greatness of America, he says, that wrongs can be corrected here and progress can be forged. “This is a country where you can succeed, if given a chance,” he says. “We were robbed of our dignity. But now we have it back.”

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## High Profile Case Goes to Mediation

Mediation is increasingly being used in the U.S. in high profile cases. In late November 1999, a federal judge appointed a mediator to assist Microsoft and the Department of Justice in finding shared, middle ground. The Justice Department has accused Microsoft of monopolistic practices. The corporation denies the allegation and argues that the degree of innovation and change occurring in the technology field precludes that possibility. Although a final ruling has not been issued by a court in the case, an initial ruling did find Microsoft held a monopoly power over desktop computers and that the company uses this power to punish rivals.

The mediator in the case—U.S. Circuit Judge Richard Posner—will have his work cut out for him since the gulf between the U.S. government's position and Microsoft's is very wide. But many American newspapers are saying that if anyone can successfully mediate this case it is Posner, who is held in high regard in U.S. legal circles and is a distinguished federal appeals judge.

Initial press reaction to the move was supportive. The *Washington Post* called it wise. "Though there appears now to be little common ground between

the parties, it is a good idea for Judge Jackson (the judge who appointed the mediator) to find out for sure whether settlement is impossible before issuing a ruling that could affect competition in the high-tech area for years to come."

The *Chicago Tribune* reported that both sides warmly greeted the announcement. "It is the strongest sign that both sides may be ready to mediate the case," the newspaper said. Its sources indicated that Posner is widely trusted as fair and impartial with unorthodox views that cannot be easily characterized politically.

The *Boston Globe* said that the appointment of Posner "could raise hopes that a serious effort will be made to settle this matter," and raised the issue of whether Microsoft might face more severe penalties, including a breakup of the company if a settlement is not reached.

Judge Posner can be expected to clearly indicate to both sides the risks involved if an agreement is not reached and the case goes back to the courts for final adjudication, with a lengthy and costly appeals process the likely aftermath of a verdict.

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## Internet Sites on Mediation and the Courts

### **Academy of Family Mediators (AFM)**

<http://www.mediators.org>

AFM is the largest family mediation organization in existence. Members are mediators working in a variety of settings including private practice, courts, schools and government in the United States and internationally.

### **ADR & Mediation Resources**

<http://adr.com/>

Contains substantial on-line materials for alternative dispute resolution and mediation.

### **American Arbitration Association**

<http://www.adr.org/>

The most comprehensive site for up-to-the-minute information about mediation, arbitration and other forms of alternative dispute resolution (ADR).

### **American Bar Association: Section of Dispute Resolution**

<http://www.abanet.org/dispute/>

### **Association of Attorney-Mediators (AAM)**

<http://www.attorney-mediators.org/>

A nonprofit trade association whose members are qualified, independent attorney-mediators offering mediation services.

### **FindLaw: ADR/Arbitration Articles**

[http://library.findlaw.com/ADRArbitration\\_1.html](http://library.findlaw.com/ADRArbitration_1.html)

### **Guide to Alternate Dispute Resolution (ADR)**

<http://www.hg.org/adr.html>

Sponsored by Hieros Gamos: The Comprehensive Law and Government Portal, this site gives an overview of ADR with international sources. Site also available in French, German, Italian and Spanish.

### **The Justice Center of Atlanta (JCA)**

<http://www.justicecenter.org/>

The Justice Center of Atlanta (JCA) began as a pilot project in 1977 funded by the U.S. Department of Justice. It was one of three sites nationally chosen to implement the Neighborhood Justice Center Project whose objective was to determine if alternatives to litigation, such as arbitration and mediation, could more quickly resolve disputes without violating any party's due process or civil rights.

**Language of ADR: Glossary**

<http://www.academy-experts.org/language.htm>

**Law Journal Extra! Arbitration & ADR**

<http://www.ljextra.com/practice/arbitration/arbrsrc.html>

Legislation, recent court decisions, news updates, articles and forums on alternative dispute resolution.

**Legal Information Institute: Alternative Dispute Resolution**

<http://www.law.cornell.edu/topics/adr.html>

An overview of ADR and U.S. cases, international conventions and treaties and links to ADR sources.

**Mediate-Net**

<http://www.mediate-net.org/>

A research and demonstration project of the Program for Dispute Resolution at the University of Maryland School of Law and the Center for On-Line Mediation.

**Mediation Information & Resource Center (MIRC)**

<http://www.mediate.com/>

**Society of Professionals in Dispute Resolution (SPIDR)**

<http://www.spidr.org/>

An international membership association committed to the advancement of the highest standards of ethics and practice for dispute resolvers.

**U.S. Department of Justice Office of Dispute Resolution**

<http://www.usdoj.gov/odr/index.html>

The office is responsible for ADR policy matters, ADR training, assisting lawyers in selecting the right cases for dispute resolution, and finding appropriate neutrals to serve as mediators, arbitrators, and neutral evaluators.

**Victim Offender Mediation Association (VOMA)**

<http://www.voma.org/>

Created so that greater networking among practitioners and other interested individuals would enhance the overall credibility of victim offender mediation and reconciliation programs within the justice community.

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